U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 04Jun2002

In the matter of:

DENNIS DUMAW,
Complainant

Case No.: 2001-ERA-6

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 690; and FOSTER WHEELER ENVIRONMENTAL CORPORATION,
Respondents

Appearances:

Leo P. McGuigan and Mary Ruth Mann
Law Offices of Mann and Peck
Seattle, Washington
For the Complainant

Kenneth J. Pederson
Davies, Roberts & Reid, L.L.P.
Seattle, Washington
For Respondent International Brotherhood of Teamsters, Local 690

Steven R. Peltin
Preston Gates & Ellis L.L.P.
Seattle, Washington
For Respondent Foster Wheeler Environmental Corporation

Before: Alice M. Craft
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This proceeding arises from a claim of whistleblower protection under the Energy Reorganization Act, 42 U.S.C. § 5851, the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act), 42 U.S.C. § 6971, the Toxic Substances Control Act, 15 U.S.C. § 2622, the Comprehensive Environmental Response, Compensation and Liability Act,

42 U.S.C. § 9610, the International Safe Container Act, 46 U.S.C. § 1506, the Occupational Safety and Health Act, 29 U.S.C. § 651, the Federal Water Pollution Control Act, 33 U.S.C. § 1367, and the Safe Drinking Water Act, 42 U.S.C. § 300(j)-9(i). These statutes and implementing regulations at 29 CFR Part 24 protect employees from discrimination in retaliation for engaging in protected activity such as reporting health, safety or environmental violations. In this case, the Complainant, Dennis Dumaw, alleges that he was laid off (and eventually terminated) from his position as a Business Agent for the International Brotherhood of Teamsters, Local 690 ("Local 690") as a result of his support of fair treatment for another Teamster, Matthew Taylor. Dumaw does not claim that he himself is a whistleblower under the cited statutes. Rather, he maintains that Taylor is a whistleblower, and that Local 690 and Foster Wheeler Environmental Corporation ("Foster Wheeler") conspired to discriminate against Taylor, and against Dumaw because he refused to participate in discrimination against Taylor.

STATEMENT OF THE CASE

Dennis Dumaw filed a complaint with the Occupational Safety and Health Administration of the Department of Labor ("OSHA") dated August 22, 2000, received by OSHA on August 30, 2000. He alleged he had been laid off on August 3, 2000, in violation of eight different whistleblower statutes. He alleged that Local 690 and Foster Wheeler committed or conspired to commit various acts of discrimination against Matthew Taylor because he is a whistleblower, against Dumaw's brother and fellow Teamster, Pat Dumaw, because of his age and association with Taylor, and against himself because he refused to cooperate with discrimination against Taylor and Pat Dumaw.

On December 11, 2000, the Regional Administrator for OSHA issued his findings on the complaint. The Administrator stated that the investigation did not find evidence to support Dumaw's claim that the Respondents conspired to deprive him of employment by causing his discharge in retaliation for protected activity. The Administrator found that Local 690 provided clear and convincing evidence that Dumaw would have been dismissed regardless of protected activity. He found insufficient evidence that Foster Wheeler influenced or coerced Local 690 to fire Dumaw. The Administrator dismissed the claims under the International Safe Container Act, the Water Pollution Control Act and the Occupational Safety and Health Act because neither Dumaw nor Taylor had complained of violations of those acts. He dismissed the Energy Reorganization Act claim against Foster Wheeler because the statute requires the complainant to be an employee of the respondent, but Dumaw was an employee of Local 690, and not of Foster Wheeler. He found that the Solid Waste Disposal Act and Comprehensive Environmental Response, Compensation and Liability Act could be applied to Foster Wheeler because they prohibit discrimination by a "person" against a "representative of employees." The Administrator concluded that Dumaw was involved in protected activity by acting as the authorized representative of a whistleblower (Taylor), but that he had failed to establish that his protected activity motivated adverse action against him.

Dumaw appealed the OSHA findings by means of a Notice of Appeal and Request for

Hearing transmitted to the Office of Administrative Law Judges ("OALJ") by facsimile on December 15 and 18, 2000.

Both Respondents filed motions for summary decision. Foster Wheeler sought dismissal of the claim against it on the ground that Dumaw would be unable to establish that Foster Wheeler played any role in Dumaw's discharge from his position with Local 690. Local 690 sought dismissal of the claim against it on the grounds that the statutes alleged as a basis for the claim do not protect employee representatives or do not cover Local 690, and because Dumaw would be unable to establish a prima facie case. During the telephone prehearing conference held on July 3, 2001, which was transcribed for the record, I ruled that sufficient evidence was raised in response to the motions that the case should go forward for hearing on the facts. I took Local 690's legal arguments under advisement to be addressed in my Recommended Decision and Order after hearing. During the prehearing conference I also denied the Complainant's motion to strike the Respondents' exhibits.

I conducted a hearing on this claim on July 10, 11 and 12, and October 15, 16, and 17, 2001, in Spokane, Washington.[1] All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, Complainant's Exhibits ("CX") 3, 5, 6, 8, 10, 15, 19, 23, 32, 36, 49, 51, 65, and 79, Respondent's Exhibits ("RX") 3, 7, 8, 14, 15, 16, 17, 18, 19, 21, 25, 27, 28, 33 (pp. 100950, 100984 and 101023-24 only), 34, 35, 36 and 37, and portions of the deposition of Alan Wolleat designated by highlighting, were admitted into evidence. CX 92[2] and a letter from Local 690 terminating the employment of David Anderson as a Business Agent[3] were excluded from evidence, as were three of the Complainant's witnesses.[4]

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[1]On July 12, counsel for the Complainant reported an incident in which a witness, Monica Harvey, had been deliberately run off the road on her way to the hearing the day before. Counsel requested a recess to investigate whether that and other incidents were related to an attempt to intimidate the Complainant, his counsel and witnesses from pursuing the case. *See* Transcript Volume ("Tr.") III at 4-29; 72-104. The incidents were reported to federal and local authorities; however, no substantial progress was made in investigating the incidents during the interim between July and October. Complainant's request for a continuance of the October resumption of the hearing was denied during a telephone conference held on September 27, 2001. The conference was transcribed for the record.

[2]CX 92 was a written declaration by Harvey offered into evidence during the first week of hearing. *See* Tr. III at 38-47. Harvey testified during the second week of the hearing. Tr. IV at 162 et seq.

[3]*See* Tr. VI at 535-536.

[4]For discussion of the witnesses who were excluded, as to Bill Murrin and Jack Berger (also spelled "Burger" in the record), *see* Tr. III at 84-94,107-113; as to Mr. Mokuiki, *see* Tr. IV

The record was held open after the hearing to allow the parties to submit closing and reply briefs. All parties submitted briefs by December 17, 2001, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at hearing and the arguments of the parties.

ISSUES

1. Whether OALJ has jurisdiction over claims invoking the International Safe Container Act and the Occupational Health and Safety Act. *See* Tr. I at 4-5; Local 690's Brief in Support of Motion for Summary Decision at 13, n. 8; Foster Wheeler's Post-hearing Brief at 7.

2. Whether Dumaw has standing to bring claims under the Federal Water Pollution Control Act and the Safe Drinking Water Act, statutes not invoked by Taylor. *See* Local 690's Brief in Support of Summary Judgment at 13; Foster Wheeler's Post-hearing Brief at 7.[5]

3. Whether Dumaw has standing to maintain a claim against Foster Wheeler, which was not his employer, under the Energy Reorganization Act. *See* Foster Wheeler's Post-Hearing Brief at 7-8.[6]

4. Whether Local 690 is a covered "employer" under the Energy Reorganization Act. *See* Local 690's Brief in Support of Motion for Summary Decision at 14.

5. Whether Dumaw engaged in activity protected by the Comprehensive Environmental Response, Compensation and Liability Act, and/or the Solid Waste Disposal Act/Resource Conservation and Recovery Act. *See* Foster Wheeler's Post-hearing Brief at 8.

6. Whether Local 690 is a covered "person" under the Comprehensive Environmental Response, Compensation and Liability Act and/or Solid Waste Disposal Act/Resource Conservation and

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at 124-140; Tr. VI at 606-615, 638-642. Complainant's motion to depose another potential witness, Billie Guarde, made in open court on October 15, 2001, was also denied, *see* Tr. IV at 140-145.

[5]Foster Wheeler also argues that Dumaw cannot maintain a claim under the Federal Water Pollution Control Act because his support for Taylor was not activity protected by the statute. Post-hearing Brief at 7. I do not reach this issue in view of my conclusion that Dumaw cannot invoke the Federal Water Pollution Control Act because Taylor did not file a claim based on it.

[6]Foster Wheeler also argues that Dumaw cannot maintain a claim under the Safe Drinking Water Act because he was not Foster Wheeler's employee, Post-hearing Brief at 7-8, an issue which I do not reach in view of my conclusion that Dumaw cannot invoke the Safe Drinking Water Act because Taylor did not file a claim based on it.

Recovery Act. *See* Local 690's Brief in Support of Motion for Summary Decision at 14-16.

7. Whether Dumaw has standing to maintain a claim as a whistleblower representative, but not a whistleblower, under the Energy Reorganization Act and/or the Toxic Substances Control Act. *See* Local 690's Brief in Support of Motion for Summary Decision at 13-14.

8. Whether the evidence shows that Foster Wheeler discriminated against Dumaw in retaliation for supporting Taylor or filing his own claim.

9. Whether the evidence shows that Local 690 discriminated against Dumaw in retaliation for supporting Taylor or filing his own claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. SUMMARY OF THE EVIDENCE

Dennis Dumaw is 54 years old and has been a Teamster since 1971. Tr. I at 59. Local 690 of the Teamsters Union is headquartered in Spokane, Washington. In 1997, the Secretary/Treasurer for Local 690, Buck Holliday, hired Dumaw to be a Business Agent[7] for construction jobs. Tr. I at 60-61; Tr. V at 352. The Secretary/Treasurer is the top executive of the Local and has all hiring and firing authority. Tr. I at 61; 74; Tr. V at 352. It is an elected position with a three-year term. Tr. V at 352. A Business Agent is an employee of the Local responsible for referring Teamsters to jobs and ensuring compliance with the terms of the applicable collective bargaining agreement on the job. Tr. I at 71; Tr. V at 353. Business Agents work out of the union Local office, and also visit job sites. Tr. I at 72.

Dumaw was hired to replace David Anderson, who was fired for violating union dispatch rules by referring friends and relatives to lucrative jobs ahead of other Teamsters. Tr. I at 61-63; Tr. IV at 151; Tr. V at 354-355. Dumaw filed the charges that led to Anderson's discharge. Tr. V at 355. The charges were investigated by Ed Jacobson, the Construction Director for Joint Council 28 of the Teamsters, which covers the state of Washington and the panhandle of Idaho. Ibid. When Anderson was terminated, he was given a detailed letter stating the reasons. Tr. V at 439.

Dumaw was working as an instructor at the apprenticeship training center when he learned that Anderson's position was open from Rick Imes,[8] the Training Trust Coordinator, who encouraged Dumaw to apply. Tr. I at 61, 62. The apprentice program is administered through a trust with its own board in Seattle. Tr. I at 75-76. Holliday is a Trustee of the Training Trust, Tr. V at 363, and Imes is a member of the Executive Board of Local 690. Tr. I at 75. The training

[7]The position is frequently referred to as "BA" in the record.

[8]Imes' name is misspelled in the transcript as "Ijames."

center is in Pasco, Washington, about 137 miles from Spokane. Tr. V at 361. As the Training Trust Coordinator, Imes runs the training school and gives classroom instruction. Tr. V at 362. He is responsible for seeing that apprentices receive a broad variety of experience. Tr. I at 238-239; Tr. V at 522.

Local 690 currently has about 3300 members. Tr. V at 352. In September 1999, Local 690 assumed responsibility for dispatching Teamsters to construction work in eastern Washington state, including the Hanford Nuclear Reservation ("Hanford"). Tr. I at 60-61; Tr. II at 355; Tr. V. at 356. The construction merger affected several Teamster Union Locals and added to the geographic area for which Local 690 was responsible. Tr. II at 386. When the territory was added, Local 690 hired an additional Business Agent, Dennis Reeseman, to assist Dumaw. Tr. V at 356. Reeseman is also a member of the Executive Board of Local 690. Tr. II at 385.

Hanford is "a government-owned, contractor-operated . . . nuclear facility." *Bricker v. Rockwell International Corp.*, 10 F.3d 598, 599 (9th Cir. 1993); Tr. VI at 593. The Hanford site is about 150 miles from the Spokane headquarters of Local 690. Tr. I at 155. Working conditions at Hanford are governed by the Hanford Site Stabilization Agreement ("HSSA"), a master collective bargaining agreement which applies to all contractors, subcontractors and union employees performing construction at the site. CX 15; Tr. I at 80; Tr. VI at 572-573.

Hiring Hall Rules governing construction job referrals of Teamsters by Business Agents were introduced into the record as CX 79 and RX 7. Out-of-work Teamsters are supposed to report to the Local so they can be referred for other work. Tr. I at 164. Members must register, and a sign-in sheet to be signed monthly is maintained at the office of Local 690 to keep track of out-of-work members. Hiring Hall Rules, ¶¶ 1-4. Normally Teamsters are called in the order that they register if they meet the required qualifications, with some exceptions. Tr. I at 164; Tr. V at 353-354; Hiring Hall Rules, ¶ 9. Members may designate which geographic areas they are willing to work. Hiring Hall rules, ¶ 10. Employers may request members by name, skill or special qualifications. Hiring Hall Rules, ¶11. Construction work is seasonal, and layoffs are common. Tr. I at 161-162; Tr. IV at 225. Teamsters prefer long-term jobs over short-term jobs, but do not have the right to turn down a short-term job because of its length. Tr. I at 116, 198. A qualified member who refuses a job is removed from the list for the duration of the month. Hiring Hall Rules, ¶ 6. A member who quits a job or is terminated for cause goes to the bottom of the list. Hiring Hall Rules, ¶ 12. Only unemployed members may register on the list. Hiring Hall Rules, ¶ 15. The HSSA also states that the unions should not knowingly refer employees currently employed by an employer to other employment. Art. VII Sec. 3(E), CX 15 at 4. Art. XX, Sec.11 of the HSSA specifically provides that seniority does not apply and that continued employment "is contingent upon the skill, productivity, and qualification of the employee." CX 15 at 14. Dumaw testified that the order of referral still makes a difference because "it's kind of an implied seniority. They'll kind of keep the first one and lay the last one off first, even though there's no rules to that effect." Tr. I at 109. Dumaw testified that he thought the 15-day rule, pursuant to which a Teamster referred to a job for less than 15 days does not have to sign up or drop to the bottom of the list, applied to Hanford, Tr. I at 105-106, 200-201. The 15-day rule does not appear in the

Hiring Hall rules or the HSSA. It does appear in the agreement between the Teamsters and the Associated General Contractors of America ("AGC"), RX 18 at 23-24, but that agreement does not apply to the Hanford site. *See* Tr. II at 366; CX 15; RX 18. The Hiring Hall Rules were based on the AGC agreement. *See* RX 7. Dumaw was not alone in his belief that the 15-day rule applied. Tr. II at 366-368. I conclude that the 15-day rule was generally applied in dispatching Teamsters to construction jobs from Local 690, including dispatching to Hanford. Tr. I at 177-178; Tr. II at 323, 336-337, 342-344; Tr. IV at 246.

Matthew Taylor is a Teamster who was employed by various employers at the Hanford site before Local 690 assumed jurisdiction for Hanford. He complained of health and safety violations and filed whistleblower complaints against several of the companies working at the Hanford site, including Roy F. Westin ("Westin"). Tr. II at 428-433. Taylor keeps a diary of events. A portion of it was entered into evidence. CX 36. Dumaw had first met Taylor when Dumaw was Taylor's instructor at the Training Center. Tr. I at 74; Tr. II at 425. Dumaw maintains that Imes was upset that Taylor caused trouble at the Westin project. He also testified that Taylor was ostracized by fellow union members because his whistleblowing activities caused slowdowns in work. Tr. I at 78-80. Dumaw did not always speak up for Taylor when others spoke out against his whistleblowing activities. Tr. II at 290-292. Nor did Dumaw always agree with Taylor's complaints. Tr. II at 293-297; RX 33 at 100950. Taylor testified that some union members objected to his raising safety concerns because "[t]hey thought I was just making trouble." Tr. II at 430-431. Dick Southwick had been Taylor's Business Agent before the merger of construction work in Local 690 and according to Taylor, expressed hostility to Taylor when he pursued his grievance against Westin. Tr. II at 440. Taylor left the Westin job in October 1999 pursuant to an agreement reached in connection with a settlement. Tr. II at 433.

Foster Wheeler obtained a contract to perform work at the Hanford site in the spring of 2000. Jobs for Foster Wheeler were expected to be long-term jobs. Tr. I at 115, 181. The project was expected to last two years. Tr. IV at 272; Tr. V at 399. Dumaw dispatched Southwick as the first Teamster at Foster Wheeler. Dumaw referred Southwick to be the Teamster foreman for Foster Wheeler at the request of Charlie Blankingship,[9] Foster Wheeler's Senior Site Superintendent. Tr. I at 88, 166. The HSSA allows employers to request a foreman by name. HSSA Art. XX, Sec. 2, CX 15 at 13. The foreman is assigned responsibilities to act as a liaison between workers and management. The foreman has no authority to hire, fire or impose disciplinary action, but does have authority to assign work and review that it is being performed properly. Tr. VI at 594. Southwick would take his direction from the Superintendent and relay it to the crew members, and he drove a truck himself. Tr. VI at 595. Southwick was also named to act in the capacity of steward to fill in until more Teamsters were sent out. Tr. I at 91, 166. The shop steward is supposed to try to handle any problems or infringement on the work of Teamsters. Tr. I at 169. The steward is supposed to be the last Teamster laid off from a job. Tr. I at 103, 226; Tr. V at 392; HSSA Art. IX, Sec. 2, CX 15 at 5.

[9]Blankingship's name is frequently misspelled as "Blankenship" in the record.

Taylor had not worked since he left the Westin job. Tr. II at 434. He began calling Dumaw about the Foster Wheeler job at the beginning of May. He felt that he was getting resistance to his being referred to Foster Wheeler. Tr. II at 437. He asked Dumaw to send him to Foster Wheeler as a steward, but Dumaw told him he could not because it required Executive Board approval, and the Board "was not letting him make any more stewards." Tr. II at 543. Taylor complained to Dumaw that Southwick was working at Westin when Southwick was referred to Foster Wheeler, but Dumaw told him Southwick had been laid off from Westin, and that he (Dumaw) "had to send out a steward and that Dick had been a steward before." Tr. II at 437-438, 441-442.

Before the project started, a trades meeting was held for various union and company representatives. Tr. I at 84. Dumaw testified that after the meeting, Blankingship commented "that he wanted to reassure me that his job, while he was superintendent for Foster Wheeler, he did not want to have the kinds of problems that Westin had while they were on the project." Dumaw did not ask Blankingship to explain what he meant, but took it to mean "that he was referring to the problems they had with Matthew Taylor shutting the job down for safety concerns." Tr. I at 85-86. Shortly after the Foster Wheeler project started, Dumaw went out to Hanford to take some papers for signature. At a meeting with Blankingship and Southwick, Dumaw contends that Blankingship said:

> . . . that he wanted to let me know that he wanted his job to run good. He didn't want any trouble out there and he said, "I understand you have a person on your list that's been quite a problem, and I don't want that trouble-making s-o-b on my job.

Tr. I at 87. Dumaw testified that he replied

> . . . "I really don't want to listen to this." I said, "I don't want to be a part of this." I said, "I have a hiring hall procedure to follow. If Matthew's name comes up, or anybody's name comes up, I will refer them out if they're qualified and what happens to them once they get to the company, is company business. But I don't want to be involved in any problems."

Tr. I at 87-88. Dumaw said that Blankingship said he understood that Dumaw had procedures to follow and not to worry about it. Tr. I at 88. Dumaw could not remember if Southwick said anything at the meeting. However, Dumaw also said that on a previous occasion, Imes and Southwick had

> . . . raised the concern over whether there was any place else I could get Matt out working, so that when they did start calling guys, that if I would let them know when Matt was out, then they could call for a Teamster. That way they would avoid getting Matt.

Dumaw said he responded,

> I told them I wouldn't do that. I said, "If there is work that comes in Matt's area that he has checked that he is willing to work in and he's qualified for, I'll call him. But if there's no work that comes in his area, I'm not going to call him for work outside of it. I would not do that."

Tr. I at 89.

Dumaw said he dispatched Taylor when he received a voice-mail message from Southwick that another driver was needed. Tr. I at 92. After he dispatched Taylor, he received another voice mail message, "By the way, Dennis, make sure that the next driver has articulated experience." An "articulate" is a specialized truck for hauling rock which bends in the middle. They tip over easily and have a rough ride. Ibid. Dumaw testified that after he dispatched Taylor, Southwick

> called me on my phone and started screaming at me, "What kind of bull shit are you pulling sending Matt Taylor out here?" And . . . I said, "Dick, Matthew's name came up on the list, he's qualified, he's dispatched plain and simple."
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> . . .
>
> He said, "Well, I don't appreciate that. But I'm not going to worry about it." He said, "I'm the foreman out here. I'll figure out a way to get rid of Matt."

Tr. I at 93.

Dumaw's testimony that Southwick was hostile to Taylor was corroborated by Monica Harvey, a Laborer who car pooled to Foster Wheeler with Southwick. She said that she did not really want Taylor on the job either, Tr. IV at 172, and that many people do not want Taylor on the job because they do not like to be involved in situations like the Dumaw hearing, Tr. IV at 176. She said she avoided conversations with Taylor because she knew he was taking notes, and that every conversation would be documented. Tr. IV at 186. Harvey testified that Southwick told her he thought he could get out of having Taylor on the job by requesting a particular type of truck, Tr. IV at 170, and that he talked daily about getting rid of Taylor, Tr. IV at 181. Harvey also testified that Blankingship, Southwick and Rick Timez,[10] the steward for the Laborers' union, asked her to make a complaint against Taylor for sexual harassment based on a lunchroom conversation which she found funny. Tr. IV at 173-175, 196-197.

Dumaw's testimony that Imes, Southwick and Blankingship did not want Taylor referred to the Foster Wheeler job because Taylor was a whistleblower is essentially uncontradicted in the record. None of the three testified at the hearing. In appropriate circumstances, when the parties choose not to

[10]Also spelled "Tomaz" in the transcript.

call a witness, an ALJ may draw an inference that the witness would have testified adversely to the party. *See Immanuel v. Wyoming Concrete Industries, Inc.*, USDOL/OALJ Reporter (HTML), ARB No. 1996-022, ALJ Case No. 1995-WPC-3 at 10 (ARB May 28, 1997), *reversed on other grounds sub nom. Immanuel v. U.S. Dept. of Labor*, 139 F.3d 889 (4th Cir. 1998). Dumaw's testimony about Southwick's animus against Taylor was corroborated by Harvey. Based on my observation of her demeanor, I found Harvey's testimony to be candid and straightforward. She admitted that she herself had reservations about working with a whistleblower. Although she also had some problems while working at Foster Wheeler, and eventually filed a charge of sex discrimination, Tr. IV at 182-185,189-193, 197-198, her testimony did not appear to be improperly biased. For example, she testified that Southwick told her Dumaw was fired for pulling Pat Dumaw off another job to come back to Foster Wheeler, Tr. IV at 188, 209, testimony which supports the Respondents' position in this case. She had only met Dennis Dumaw one time before the hearing, and did not know what she was going to be asked in advance of the hearing. Tr. IV at 200-206. I conclude that if Southwick had been called as a witness and testified truthfully, he would have admitted that he did not want to work with Taylor because he is a whistleblower. Furthermore, Dumaw's testimony that Imes and Blankingship did not want Taylor to work on the Foster Wheeler project because of the effect his whistleblowing activity had on the Westin job is uncontradicted, and I also credit Dumaw's testimony on that point. *See Smith v. Esicorp*, USDOL/OALJ Reporter (HTML), ALJ No. 1993-ERA-16 at n. 8 (Sec'y Mar. 13, 1996) (By failing to call a witness, respondent "assumed the risk that . . . uncontradicted evidence would be found credible.").

Dumaw dispatched Taylor to Foster Wheeler on May 16. Tr. II at 442. Taylor reported for work but was sent home for four days after being told he could not start work until the results of a drug screen were available. Tr. II at 446. Taylor called Dumaw because he thought Foster Wheeler "knew who I was and might be trying to avoid hiring me." Tr. II at 447. Taylor said Dumaw called him back and said he would be given his badge the next day. Ibid. Taylor testified that before he was allowed to start work the following week, he was required to take a test of his ability to drive an articulate truck. Tr. II at 448-450. He said he was the only Teamster required to take such a test. Tr. II at 452, 453. Taylor thought the four-day delay after his drug test and the requirement that he take a driving test were discriminatory against him because other drivers had started to work without delay and had not been required to take the driving test. Tr. II at 454, 473. Later Southwick taught another driver, Bob Bailey, how to drive the articulate truck. Tr. II at 474. Taylor also thought that crew members were leery of talking to him. Tr. II at 465. Taylor told Dumaw about the alleged discriminatory hiring practices when Dumaw visited the site on June 7. Tr. II at 454, 473. Taylor said Dumaw told him that Dale Carruth, Foster Wheeler's Project Manager and Blankingship's supervisor, Tr. VI at 571-572, "had a problem with" Taylor.[11] Tr. II at 476, 533. Taylor did not ask Dumaw for assistance at that point because he

[11]Although Taylor said several times during his testimony that Dumaw told him that Carruth "had a problem" with Taylor, Dumaw did not so testify. The only Foster Wheeler manager identified by Dumaw as bearing animus against Taylor because of his history at Westin was Blankingship. Neither Dumaw nor Carruth was asked any questions about Taylor's

thought things were "easing up." Tr. II at 544.

Dumaw next dispatched Pat Dumaw and Bob Bailey to Foster Wheeler on May 19, 2000, to report on May 22. Tr. I at 96, 182-183, II at 452; RX 33 at 100984; RX 17. The dispatch was recorded on a form which had space to list up to nine individuals on numbered lines. Instead of recording Pat Dumaw and Bailey on separate lines, Dumaw entered Bob Bailey on line 1, and squeezed in Pat Dumaw's name above Bailey's on the same numbered line. RX 17. Dumaw testified that he did so because he had dispatched from home, and made a mistake when he filled out the form at the office on the following Monday. He said he squeezed Pat Dumaw's name above Bob Bailey's because he dispatched Pat Dumaw first. Tr. I at 100, 111. Local 690 points to this as one of several irregularities in Dumaw's paperwork indicating he was showing favoritism to his brother.

Before he was sent to Foster Wheeler, Pat Dumaw was working on the "Flowery Trail" job for the Scarcella brothers. That was the second time he worked that job; the first time he worked there, in 1999, he was named steward. Tr. IV at 241-242, 285-286; RX 21. He was uncertain whether he was still the steward when he went back the second time in the spring of 2000, Tr. IV at 287, but Dennis Dumaw thought he was, Tr. I at 176. Pat Dumaw was not the last Teamster laid off from Flowery Trail either time he worked there, but he said he did not file a grievance because it would have created animosity at the company. Tr. IV at 245. He said he did not lose his place on the hiring hall list the second time he worked at Flowery Trail because he was there less than 15 days. Tr. IV at 246; *see also* Tr. I at 177-178. He confirmed that he was sent to Foster Wheeler and went through the hiring process with Bob Bailey; he thought he was ahead of Bailey on the dispatch list. Tr. IV at 248. He testified that Bailey said he had never driven an articulate truck. Tr. IV at 251. When he arrived on the job at Foster Wheeler, he said Southwick instructed him not to associate with Matt Taylor. He replied "the man had never done anything to me and I like to make my own judgments." Tr. IV at 252. His only other encounter with Southwick had been at a shop steward seminar where they "got along great." Ibid. At Foster Wheeler, he said he could sense that Southwick did not want him there. Tr. IV at 257.

At some unspecified point in time, Southwick asked for Mike Storey to replace him as shop steward. The union procedure required shop stewards to be approved by the Executive Board of Local 690. Tr. I at 222. Dumaw checked to see if Storey was an approved steward.

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testimony that Carruth "had a problem" with Taylor. Nor did any other witness attribute any overt comments to Carruth similar to those attributed to Blankingship. Harvey testified that when she was named to a safety committee with Taylor, she asked Carruth if he knew that Taylor is a whistleblower. She said that Carruth responded, ". . . to catch a thief, keep your enemies close." Tr. IV at 173. That response is ambiguous. Given the state of the record on this point, there is insufficient evidence to draw any inference that Carruth shared Blankingship's animus against Taylor because of his history as a whistleblower. In any event, even if he did harbor some animus against Taylor, there is no evidence that he played any role in the decisions to lay off and later to terminate Dumaw from his employment with Local 690.

Because he was not an approved steward, Dumaw told Southwick Storey could not be appointed. Tr. I at 222-223. The policy requiring Board approval of stewards was adopted in response to David Anderson's abuse of his power to name stewards. Tr. V at 370. Holliday recalled that Dumaw had consulted him about Southwick's request that Storey be sent out as a steward and agreed with Dumaw's decision that Storey should not be sent. Tr. V at 519.

Pat Dumaw was laid off the Foster Wheeler job after about two weeks, on May 26. *See* Tr. II at 461. Pat Dumaw said he did not file a grievance after his first layoff from Foster Wheeler because he did not know anything was wrong. Tr. IV at 264. Dennis Dumaw also testified that he did not file a grievance when Pat Dumaw was laid off the first time. Dumaw said he talked to Blankingship, who said Bailey's paperwork was done first when Pat Dumaw and Bailey reported to work. Tr. I at 197. Dumaw said he was left with the impression that the matter would be resolved by recalling Pat Dumaw and treating him as more senior than Bailey. Tr. II at 347.

After Pat Dumaw was laid off from Foster Wheeler the first time, Dumaw sent him out on a short two- or three-day job for Contractor's Equipment. Tr. I at 115-116; Tr. III at 58-59; Tr. IV at 259-260. Both Dumaws testified that Pat called Dennis on a Friday to tell him he (Pat) would be finished at Contractor's Equipment at the end of the day. Tr. I at 116; Tr. IV at 260, 292, 293. Dennis Dumaw said Blankingship called later the same day and requested a Teamster for Monday, agreeing upon inquiry from Dennis Dumaw that Pat Dumaw would be acceptable. Tr. I at 117, 212. Then Pat Dumaw called back and said he would not finish after all, and that his job at Contractor's Equipment would take an hour or two on Monday. Tr. I at 118; Tr. IV at 261. Dennis Dumaw called Dennis Wood at Contractor's Equipment, and explained that Pat Dumaw had an opportunity to go to Foster Wheeler. Tr. I at 118. Wood then offered to lay off Pat Dumaw so he could go to Foster Wheeler. Tr. I at 119, 208; Tr. III at 61-66. Wood testified that if Dennis Dumaw had not called, he would have laid off someone else. Tr. III at 66-67. If Pat Dumaw had quit, as opposed to being laid off, then he would not have been eligible for referral to Foster Wheeler. Tr. I at 119; CX 79, RX 7. Pat Dumaw testified that he did not ask Dennis Dumaw to pull him off the Contractors Job. Tr. IV at 261. Local 690 contends that by requesting that Contractor's Equipment lay off Pat Dumaw so that he could return to Foster Wheeler, Dumaw was once again showing favoritism to his brother. Dumaw denies that he did anything improper.

Pat Dumaw was laid off by Foster Wheeler for the second time on July 14, 2000. A letter from Dennis Dumaw to Foster Wheeler naming Pat Dumaw as steward, dated July 14, 2000, was admitted into evidence as CX 49. Dennis Dumaw testified that he drafted the letter on Friday, July 14, faxed it to Foster Wheeler on Saturday, July 15, and did not learn that Pat Dumaw had been laid off until Sunday, July 16; he denied that he attempted to make Pat Dumaw a steward to give him a form of seniority. Tr. I at 124-128, 226, 227; Tr. II at 285-286, 288. Holliday contends that Dennis Dumaw wrote the appointment letter after he learned of the layoff in an attempt to obtain favorable treatment for his brother. Tr. V at 392. Dumaw admitted that he did not talk to Southwick or Holliday about replacing Southwick as steward. Tr. I at 220.

Carruth testified that after Pat Dumaw was laid off the second time, Blankingship reported to him that Dennis Dumaw had called him and threatened that if Pat Dumaw were laid off, Dennis Dumaw would cause trouble by giving information to Taylor, who would "hammer you." Tr. VI at 576. Carruth said he did not report the threat to Local 690. Tr. VI at 588. Carruth said Blankingship considered it to be an "idle threat" because "[t]here was nothing that Dennis Dumaw had to threaten us with . . ." Ibid. In view of the fact that neither Respondent called Blankingship as a witness, I give this "third-handed" (Carruth's characterization, Tr. VI at 588) testimony little weight. Foster Wheeler did not address this testimony in its closing briefs. Local 690 suggests that Dumaw was using "manufactured instances of alleged 'discrimination'" against Taylor as leverage in his attempt to obtain favorable treatment for his brother. Local 690's Proposed Findings and Supporting Brief at 31. Dumaw and Harvey provided credible testimony that Southwick and Blankingship did not want Taylor on the Foster Wheeler job because of his history as a whistleblower. Taylor's testimony made it clear that he suspected discrimination when he first went to Foster Wheeler, and brought it to Dumaw's attention. Although I have concluded that animus against Taylor did not motivate Dumaw's layoff or discharge, I do not agree that Dumaw "manufactured" its existence.[12]

After his second lay-off from Foster Wheeler, Pat Dumaw's name was entered between the lines on the sign-in sheet dated July 14 (a Friday) and July 17 (a Monday) with the date July 16 (a Sunday) by his name. RX 25. Dennis Dumaw made the entry sometime after the first July 17 entry was made. Tr. I at 232-234. The office of Local 690 is not open for Teamsters to sign the list on weekends. Tr. I at 231. If Teamsters are called out of order from the sign-in sheet, the skipped-over Teamster is entitled to an explanation of the reason, and may file a complaint with the National Labor Relations Board ("NLRB") if not satisfied with the explanation. Tr. I at 170. Dumaw conceded that the entry of Pat Dumaw's name between two others "might create some doubt . . . as to whether or not the hiring hall books were being administered fairly." Tr. I at 234.

Sometime around the time of Pat Dumaw's second layoff, Dumaw filed a grievance against Foster Wheeler about Pat Dumaw's first layoff.[13] Dumaw testified that the basis for the

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[12]My finding that certain individuals harbored animus against Taylor because he is a whistleblower should not be construed to be a finding on the merits of Taylor's claim that Foster Wheeler discriminated against him, which is not before me.

[13]The written grievance itself has not been introduced into evidence. It is not clear from the record exactly when the grievance was filed. Pat Dumaw said that two grievances were filed on his behalf, one was not filed within the prescribed period, nothing happened on the other, and he finally filed a charge alleging failure to represent with the NLRB which was dismissed by the Board and pending on appeal at the time of the hearing. Tr. IV at 266, 299-300. The HSSA allows ten working days to bring a grievance to the attention of the employer, five working days to resolve a grievance at step one and ten calendar days at step two. HSSA Art. XXIV, Sec. 1 and 2, CX 15 at 16. Assuming that Blankingship's reply dated July 26 was "step one" and timely, the grievance must have been filed in July. Logic suggests that it was filed after the second layoff

grievance was that Pat Dumaw was before Bailey on the dispatch list and should have been kept on because he (Pat Dumaw) was dispatched first. Tr. II at 334-335. Blankingship responded to the grievance on behalf of Foster Wheeler in writing on July 26, 2000, taking the position that Foster Wheeler lays off in reverse order of hire, and that Bailey was hired before Pat Dumaw. CX 5.

Taylor testified that after Pat Dumaw was laid off the second time, there was a shortage of Teamsters, and Laborers were doing work which should have been done by Teamsters. Tr. II at 469-470. Taylor said he confronted Southwick about it on July 18, but other than talking about it with Rick Timez, the steward for the Laborers (*see* Tr. IV at 174), Southwick did nothing about it. Tr. II at 471. Taylor said Monica Harvey, a Laborer, Tr. II at 467-468, CX 36 at 10061-10062, and other craft members, Tr. II at 472, CX 36 at 10064, 10065, made comments which he took to mean that Pat Dumaw had been laid off because of his age. Taylor called Dumaw and told him that other crafts were doing Teamster work, that Southwick was not doing anything to stop it, and that he had heard that Pat Dumaw had been laid off because of his age. Tr. II at 472-473; CX 36 at 100163-10064. On July 19, Taylor called Dumaw and told him he had heard an apprentice would be coming. CX 36 at 10065-10066.

On July 20, Taylor and Dennis Dumaw again spoke on the phone. According to Taylor, Dumaw told him that Pat Dumaw was ready to sue the company. Dumaw also offered to meet with Taylor the following week "to talk about what is going on. He also said that he [sic] tell me what the company did to try to keep me off the job. He was worried about protecting the union. He said it would incriminate Dick [Southwick]." CX 36 at 100167.

On July 21, Dumaw dispatched Pat Dumaw to a two- or three-day job to begin on July 24. Tr. I at 248; RX 27; RX 33 at 101023-24.

On July 22, according to his diary, Taylor spoke to Pat Dumaw and told him what he had heard about Pat being too old. Pat Dumaw asked Taylor for assistance in finding a lawyer. Pat Dumaw told Taylor that other employees (including Harvey) were "warning people" he could not be trusted because he is a whistleblower. CX 36 at 100169.

On July 24, 2000, again according to Taylor's diary, Taylor and Dennis Dumaw spoke by phone. Dumaw told Taylor he was making Taylor the steward. Dumaw also told Taylor another Business Agent was handling Pat Dumaw's grievance because Pat was his brother. CX 36 at 100170. On July 25, 2000, Dumaw named Taylor to be steward, indicating in his faxed memo to Foster Wheeler that Taylor was a temporary replacement for Pat Dumaw who had been laid off.

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when Dennis Dumaw realized that Pat Dumaw was still not being treated as if he were referred before Bailey. I conclude that the grievance about the first layoff was filed after the second layoff, and was untimely filed.

CX 3, RX 28.[14] Pat Dumaw was on the list of approved stewards, but Taylor was not. RX 19.[15] Dumaw did not ask the Executive Board to approve Taylor to be a shop steward. Tr. I at 236. Taylor testified that when Dumaw named him to be steward, he asked Dumaw to elaborate on their June 7 conversation during which Dumaw had told him that Carruth had a problem with Taylor going to work for Foster Wheeler. Tr. II at 476. Dumaw agreed to meet with him, saying it would incriminate some union officials and he was concerned for his job. Tr. II at 476-477.

Also on July 24, 2000, apprentice Alan Wolleat went to Foster Wheeler. Wolleat Deposition ("Dep.") at 10-11; Tr. I at 128; Tr. II at 552, Tr. III at 31-32. According to Wolleat, Imes told him about the possibility he might be called about a week before Imes notified him to report. Dep. at 11-12. It was Wolleat's understanding that Foster Wheeler had "a slowdown period" and did not need anyone to work the week before he was sent. Dep. at 12-14. Wolleat testified that he had joined the apprenticeship program in April 1999. Dep. at 5. Once he started working, either Imes or Dumaw would call him for work, each about half of the time. Dep. at 8.

Dumaw testified that after Pat Dumaw's lay-off, he learned from Taylor that an apprentice would be sent to Foster Wheeler. Tr. I at 245; Tr. III at 32.[16] On July 24, Taylor called Dumaw to tell him that Wolleat had shown up at the site; Dumaw told Taylor he had not dispatched an apprentice, but he would address it. Tr. I at 128; Tr. II at 552; Tr. III at 31-32. On July 24 or July 25, Tr. I at 129, 242, Imes called Dennis Dumaw and asked Dumaw to fax a dispatch slip for Wolleat to Foster Wheeler. Tr. I at 133. Dumaw protested because based on a conversation with Charlie Blankingship, he thought Foster Wheeler's policy was that an apprentice would not be called until laid off journeymen were recalled. Tr. I at 130, 243, II at 280. He said he filled out the dispatch forms, RX 15 and 16, but never sent them to Foster Wheeler. He told Taylor the dispatch form was sitting on his desk when he was laid off. Tr. III at 49. He said he never completed the third form usually sent to the employer to verify the request for an apprentice. Tr. I at 133, 243-246. He called Imes back and told him he would not dispatch Wolleat, which made Imes angry. Tr. I at 246-247. At that time, Dumaw was unaware that the HSSA, Art. XVLIII, Sec. 2 (CX 15 at 13), provided for up to one-third of employees to be apprentices. Tr. I at 252-

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[14]The fax naming Matt Taylor steward was introduced in two versions, a transmit report, CX 3, and as Foster Wheeler received it, RX 28.

[15]The version of the list entered into evidence is dated October 18, 2000. Holliday testified that the list may be revised with additions and/or deletions five or six times a year. Tr. V at 372.

[16]Initially the record was confusing about the sequence of events surrounding Wolleat's referral. Compare Dumaw's testimony, Tr I at 128-129, with his testimony, Tr. I at 241-247. As I now interpret the record, taking together the testimony of Wolleat, Taylor and Dumaw, Taylor's diary, CX 36, Hiring Hall Dispatch dated July 24, 2000, RX 15, and Referral Card dated July 25, 2000, RX 16, Taylor told Dumaw about a rumor that an apprentice was coming on July 19, Wolleat actually reported to Foster Wheeler on July 24, and Dumaw spoke to Imes and prepared part of the dispatch paperwork on July 24 and/or July 25.

253.

On July 26, 2000, Dumaw and Taylor met in person. Taylor prepared a written declaration reciting various events for Dumaw to sign, Tr. II at 520, 533, gave Dumaw a copy of a portion of his diary of events (CX 36), and made some additional notations on his own copy, Tr. III at 31-32. Taylor said that Dumaw's declaration (which was not offered into evidence) stated that Carruth and Blankingship knew that Taylor was on the hiring hall list, that they did not want Taylor on the job, and that they referred to him as the trouble maker from Westin, Tr. II at 477; and that when there was damage to the tailgate on one of the pieces of equipment, Southwick had commented that this was his way to get rid of Taylor, Tr. II at 478.[17] Also on July 26, in his capacity as union steward, Taylor prepared a letter to Foster Wheeler stating that Foster Wheeler had violated the HSSA by hiring Wolleat outside of hiring hall procedures. Taylor's letter stated that Foster Wheeler had called the Teamsters Training Center to get an apprentice, while procedure required a written request to the Construction B[usiness] A[gent]. He said that Wolleat had been working for three days without a dispatch. He stated that Dumaw had been trying to reach Blankingship, and requested that Foster Wheeler contact Dumaw immediately. CX 23.[18] He hand delivered the letter to Carruth. Tr. II at 512.

On July 28, 2000, Dennis Dumaw filed a grievance challenging the dispatch of Wolleat, an apprentice, instead of recalling a journeyman (Pat Dumaw, not mentioned by name in the grievance) who had been laid off. CX 8. Dumaw testified that he based the grievance on the Foster Wheeler policy expressed by Blankingship that journeymen would be recalled before apprentices were hired. Tr. I at 253. Imes was angry that Dumaw filed the grievance. Ibid. That is how matters stood when Buck Holliday became aware of the grievances against Foster Wheeler filed on behalf of Pat Dumaw.

Holliday testified that he thought Dumaw performed "very well" as a Business Agent. Tr. V at 358. He had received complaints about Dumaw before, and had been satisfied with Dumaw's explanations. Tr. II at 405. The first "serious question" arose the last week of July 2000. Tr. V at 358. Holliday was out of the office the week of July 24-28, 2000. His practice was to call the office twice a day when he was traveling, but noone had mentioned the events at Foster Wheeler. Tr. II at 371; Tr. V at 368-369. On July 31, 2000, Holliday's first day back in the office, Business Agent Larry Kenck[19] came to Holliday because Dumaw had asked him to

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[17]On cross examination, Taylor stated that Dumaw provided two written declarations, one on July 26, and another at a later time. Tr. II at 518. Neither was introduced into evidence.

[18]The letter dated July 26, 2000, from Taylor to Foster Wheeler Management was introduced into evidence twice. CX 6 is the letter without extra markings and without its attachments. CX 23 is the same letter which has been stamped "Received" by Local 690 on August 2, 2000, and is accompanied by its attachments.

[19]Kenck's name is misspelled as "Kink" and "King" in the Transcript.

handle two grievances relating to Pat Dumaw. Kenck's area of responsibility is public sector rather than construction; according to Holliday he "felt uncomfortable since he did not have the background." Tr. II at 371; Tr. V at 360. Before giving such work to Kenck, Dumaw should have discussed it with Holliday. Tr. II at 372; Tr. V at 360, 501. Holliday and Kenck were concerned because the grievance regarding Pat Dumaw's first layoff was out of time. Tr. II at 372. Kenck also mentioned to Holliday that there was a problem between Dumaw and Imes over a dispatch to Hanford. Ibid. Dumaw was on vacation during the early part of the week. Tr. V at 364. Holliday called Imes to inquire about the problem. Tr. II at 373; Tr. V at 364. Imes

> said he'd been contacted by Foster Wheeler for an apprentice if one was available, that he had contacted Dennis, that Dennis became quite upset with the fact that Foster Wheeler was asking for an apprentice, and that he eventually agreed to dispatch him.
>
> . . .
>
> Agreed to dispatch Alan Wolleat. Then he said, it may have been the next day and it could have been the week that I was gone, that Dennis said he wasn't going to dispatch him.

Tr. V at 364.

On August 2, Dumaw attended a meeting with Holliday and others to discuss how a contract would apply after a merger of two employers. Tr. V at 365. After the meeting, at lunch with Dumaw and Val Holstrom, the President of the Local, Tr. V at 365-366, Holliday asked Dumaw about the problem at Foster Wheeler and why Dumaw had given the grievances to Kenck to handle. Tr. II at 374. Dumaw said that the grievances were filed on behalf of his brother, so he "felt awkward in pursuing them." Tr. V at 368. Asked why he did not give them to the other construction Business Agent, Dennis Reeseman, Dumaw said Reeseman had participated in rodeos with some of the employers at Hanford, from which Holliday inferred that Dumaw viewed Reeseman as too close to them. Tr. II at 375; Tr. V at 368. Dumaw's explanation did not make sense to Holliday. Tr. V at 360. When Holliday asked Dumaw what was going on between Dumaw and Imes, Dumaw gave him a different side of the story than Imes. Tr. II at 378. Dumaw said that the apprentice had been sent to Foster Wheeler by Imes and was working before Imes advised Dumaw that Foster Wheeler had requested an apprentice. Tr. V at 367. During the course of the conversation, Dumaw mentioned that he had made Taylor a shop steward at Foster Wheeler. Holliday asked who Taylor was, and was concerned about the policy requiring Executive Board approval of stewards. When Holliday asked Dumaw about making someone a steward without going to the Executive Board, Dumaw said it was "for a temporary basis or an alternate basis or some words to that effect." Tr. II at 379; Tr. V at 369. Holliday knew Dumaw was familiar with the requirement that the Board approve stewards because Dumaw had followed the procedure when he named Pat Dumaw and others to be stewards. Tr. V at 372-373. Holliday decided it would be appropriate "to get the two of them [Imes and Dumaw] together to try and sort the mess out with the problem between the two of them." Tr. II at 379.

By letter dated August 2, 2000, again in his capacity as steward, Taylor wrote to Kenck requesting that grievances be filed on behalf of Pat Dumaw, for a hostile environment and layoff because of his age, and on behalf of Taylor, for a hostile environment and attempt to blacklist because of his protected activity as a whistleblower. CX 10. The grievance Taylor submitted on behalf of Pat Dumaw did not include any reference to discrimination because of Pat Dumaw's association with Taylor. As part of his allegations, Taylor alleged that craft foremen (including Southwick) were acting in a management capacity for which Foster Wheeler could be held responsible as the employer. Taylor sent the letter by certified mail. Tr. II at 499, 506. Based on a conversation with Dumaw, it was Taylor's understanding it was received on August 3. Tr. II at 511. Taylor said both grievances were filed late, in part because of delay after the packet was received at Local 690. Tr. II at 502-503. Taylor also filed a whistleblower complaint with the Department of Labor, received at OSHA on August 4, 2000, alleging that Foster Wheeler attempted to prevent him from employment by "blacklisting" in retaliation for protected activity, and created a hostile work environment. OSHA eventually determined that his allegations could not be substantiated. CX 51. The record is silent as to the current status of Taylor's claim.

On August 3, 2000, Holliday, Imes and Holstrom attended an Executive Board meeting at Local 390. Tr. II at 400; Tr. V at 379. According to Holliday, the meeting was about some charges filed against Holstrom, a matter unrelated to Dumaw, Taylor, Foster Wheeler, or Hanford; had been scheduled about a month in advance; and was attended by a court reporter. Tr. V at 379-380. After the meeting, the Executive Board went to lunch where Holliday asked Imes and Holstrom to accompany him to Dumaw's office, where a confrontation took place. Tr. V at 381. Dumaw contends that before the confrontation occurred, he received a telephone call from Taylor to expect a package of materials. According to Dumaw, Taylor said "all hell is going to break loose" when the package arrived. Based on the sequence of events, I conclude that the "package" contained the August 2 request to Kenck to file grievances on behalf of Pat Dumaw and Taylor, CX 10. Because the grievances included accusations of misconduct by Southwick, a fellow Teamster, Taylor's prediction of the reaction at Local 690 makes sense in that context. The package could not have arrived until sometime during the morning of August 3 at the earliest. Dumaw testified that the package arrived and that he requested the secretary to make a copy for himself, for Holliday, and for the file. Dumaw said that he was terminated about two hours later. He never got a chance to see the contents of the package. Tr. II at 326-327; 338-341. Holliday testified that he did not remember, but guessed that he did not see the package until the following week. Tr. II at 393-394. Counsel for Dumaw attempted but failed to establish that Holliday saw the contents of the package before he laid off Dumaw, Tr. II at 393-396, and that the reason for the meeting of the Executive Board on the morning of August 3 was receipt of the package, Tr. V at 461. I credit Holliday's testimony about the purpose of the morning meeting, as Complainant's theory is completely speculative. Furthermore, based on the sequence of events that morning, including the fact that Dumaw did not see the package before the confrontation, I find credible Holliday's assertion that he, too, had not reviewed the package before the confrontation with Dumaw.

Regarding the confrontation, according to Dumaw, Holliday, Holstrom and Imes walked

into his office. Holliday asked Dumaw to explain what was going on at Foster Wheeler. Imes

> immediately jumped up an started hollering, leaning over my desk, poking me in the face, and screaming. I was trying to answer and he kept it up and finally Mr. Holliday said, "Hey Rick, cool it. This isn't getting anywhere," or something to that effect. Then he said, "Dennis, as of this moment you are laid off pending the investigation or outcome of this whole Foster Wheeler mess." He said, "Turn in your credit card, your keys, your cell phone, and go."

Tr. I at 140. After Holliday left his office, Dumaw said Imes came back and started "hollering and screaming" again, saying Dumaw had put "too much stock in what Matt Taylor has been telling you, too much hearsay." Tr. I at 140-141. Later while Dumaw was putting his personal belongings into his truck, Imes apologized "for threatening to take you outside and kick the shit out of you." No action was taken against Imes for his behavior during the confrontation. Tr. I at 141. *See also* Tr. I at 256-258.

Holliday's version of the confrontation was similar to Dumaw's account. Dumaw and Imes disagreed over the sequence of events, whether Dumaw had agreed to dispatch Wolleat or Imes had dispatched Wolleat before notifying Dumaw. Tr. V at 382. According to Holliday, "the two were in a very heated argument over the issues. . . . And there wasn't any continuity or agreement on any of the facts." Tr. V at 382-383. Holliday said that after some preliminary questions,

> At some point in time he [Imes] did put his hands on Dennis' desk. And he pointed at him and used loud and offensive language. And Dennis had been arguing and had been somewhat loud prior to that. And, at some point in time the statement was made by Rick, words to the effect that, "Well, maybe we should go out and settle it in the parking lot." And he may have said something like and, "Kick your ass or whatever."

Tr. II at 402; *see also* Tr. V at 383. Holliday "told them both to knock it off" and left the meeting for a few minutes to take a call. Ibid. When he returned, Dumaw and Imes were still in disagreement. Asked how the meeting ended, Holliday testified, Tr. V at 383-384:

> The meeting ended with I'd have to say the dilemma that I still had. I had one person saying one thing, I had the other person saying the other, and I felt that it was in the best interest to diffuse the situation. I told Dennis that he was to be considered laid off pending the investigation of this matter and for him to turn in his keys and credit cards.

Holliday testified that before he laid Dumaw off, Dumaw had never said that he was trying to protect Matthew Taylor from discrimination. Tr. V at 359. Holliday said no one made any reference to Taylor before or during the meeting on August 3. Tr. V at 384, 403. Even according to Dumaw's version of the confrontation, Taylor's name came up only after Holliday left the room. Accepting Dumaw's account of what Imes said, and based on the context of the

argument, I conclude that Imes' comment that Dumaw put "too much stock in what Matt Taylor has been telling you" was a reference to what Taylor told Dumaw about Pat Dumaw's layoff, and had nothing to do with whistleblowing. Holliday denied that he knew that Taylor was a whistleblower, or "really what a whistle blower meant," until the "last year." Tr. at 389. Holliday denied that Southwick or Blankingship expressed anti-whistleblower sentiments to him.. Tr. II at 389-390, 396-397. Taylor was a relatively recent member of Local 690, as Local 690 had only taken over responsibility for Teamsters working at Hanford in September 1999. Holliday testified that when he learned on August 2 that Dumaw had named Taylor to be a steward, he did not know Taylor. Tr. V at 377-378. Taylor confirmed that he had never met Holliday individually, or spoken to him. Tr. II at 542. There is no evidence in the record that Holliday was aware on or before August 3, 2000, that Taylor is a whistleblower, or that Dumaw had opposed discrimination against Taylor, or was assisting him with a complaint against Foster Wheeler.

In early August 2000, with the assistance of Dennis Dumaw, *see* Tr. IV at 295-298, Pat Dumaw wrote a letter to Buck Holliday and the Executive Board of Local 690, RX 36. The letter was stamped "Received" on August 8. The letter stated,

> I have been hearing some very disturbing things from members concerning my being sent to work at Foster Wheeler at Hanford.
>
> I went to all the necessary training needed to get a job at Hanford while I was out of work last winter, and when I was laid off from Scarcella Bros. . . . I had not been out for 15 days therefore I did not loose [sic] my place on the list.
>
> I then was sent to Hanford for work with Foster Wheeler. I was on the list ahead of Bob Bailey and despatched before Bob . . . Dick Southwick did not like the fact that I came on this job and everyone knew it. He wouldn't give me directions on what I needed to do. . . . Matt Taylor tried his best to explain to me how things work. It was common knowledge that Dick wanted Mike Storey on this job instead of me.
>
> Dick came to me and said there wasn't enough work to keep 4 drivers busy so he was laying me off for lack of work. I asked him why I was being layed [sic] off instead of Bob and he said last hired first layed off.
> I didn't say any more, I just went home. I was off for about 2 weeks and got a call to go to work for Contractors Equipment for 2 or 3 days so I took it.
>
> While I was hauling to Foster Wheeler I was talking to Matt and he told me they were going to hire a Teamster back for Monday . . . I called my brother Dennis at lunch . . . and told him that I would be done Friday afternoon.
>
> . . . My brother did not pull me off any job and send me back to Hanford. I was laid off for lack of work and now there was more work.

. . .

> It was very apparent from the moment I went back to work that I was not wanted here. I kept hearing people saying I was to [sic] old, or looked sick, or they didn't think I could do the work, but I did.
>
> We were really busy and then they sent Bob Bailey to class and sent Dick to drive for Weston for 2 days. Then Matt and I were really busy.
>
> I was never sent for a physical like everyone else or sent for training. Then Dick came and said they were laying me off again because they didn't have enough work. I didn't understand this, because we were busier that [sic] before. I asked Dick if I had done anything wrong is that why I was getting layed off and he said no, we just don't have enough work to keep 4 drivers busy. But I knew the real reason, everyone on the site knew what they were trying to do.
>
> . . .

I infer from the letter that both Dumaws were aware in early August 2000 that an allegation had been made that Dennis Dumaw was showing favoritism to Pat Dumaw by dispatching him to Hanford. I also infer that both Dumaws thought Pat Dumaw had been treated unfairly by Dick Southwick. The letter suggests that at that time, they thought the unfair treatment was because Southwick wanted Storey instead of Pat Dumaw, and because of Pat Dumaw's age. There was no mention in the letter that the treatment of Pat Dumaw was related to Taylor's history of whistleblowing activity. As Taylor had reported that Pat Dumaw was laid off because of his age, not lack of work, and was being replaced by an apprentice, it would not be surprising for the Dumaws to conclude that Pat was a victim of age discrimination.

At hearing, Pat Dumaw testified that Southwick treated him badly when he came back to Foster Wheeler the second time. He said Southwick would only talk to him when he had to. He said he believed it was because Southwick did not want Taylor there, "and I was, quote, talking to Matt, and I was Dennis's brother." Tr. IV at 263, 274-275. He never identified age discrimination as the reason for his treatment during his testimony, even when asked on cross examination about his charge filed with the Equal Employment Opportunity Commission ("EEOC") on August 9, 2000, RX 34, and his suit filed in state court on June 5, 2001, RX 35, both of which alleged age discrimination. Tr. IV at 275-281. I found Pat Dumaw to be an inarticulate witness, forgetful of dates and the sequence of events, and uncooperative in responding to questions posed by counsel for Local 690. Although his testimony about events was generally consistent with other witnesses, his testimony regarding Southwick's motivation for laying him off was inconsistent with the allegations in the grievance filed on his behalf by Taylor, the letter he signed, and the EEOC charge. The allegation that Pat Dumaw's association with Taylor was a factor in his layoff was included in Dennis Dumaw's complaint filed with OSHA, but did not surface in Pat Dumaw's own case until he filed the state court complaint, almost a year

later. *See* RX 35 at 2, ¶2.3. I conclude that his testimony on that point was hindsight and tailored to support his brother's claim. In any event, he did not provide any evidence other than speculation that his or his brother's association with Taylor was a factor in their treatment by Local 690 or Foster Wheeler.

Dennis Dumaw's complaint dated August 22, 2000, alleging that his layoff violated various whistleblower statutes, was received by OSHA on August 30, 2000. Tr. I at 260-263; *see* the complaint.

Holliday testified after he laid off Dumaw, he initiated an investigation. Tr. V at 387. When Holliday saw the Hiring Hall Dispatch, RX 15, and Referral Card, RX 16, that Dumaw filled out for Wolleat, he concluded that they substantiated Imes' side of the story because

> they confirmed that Dennis had done the dispatch. He may have disagreed with the dispatch, but he physically went ahead and filled out all the paperwork and – including the referral card. It told me that he was not telling me the truth before.

Tr. V at 387. The fact that Dumaw filed a grievance about the referral of Wolleat was "[a]bsolutely inconsistent" with the dispatch, because by filing a grievance based on his own action, Dumaw had "remove[d] the merits of any grievance." Ibid. Holliday also testified that the grievance Dumaw filed on behalf of Pat Dumaw over the dispatch of Wolleat had no merit because Pat Dumaw had already been dispatched to another employer when the grievance was filed on July 24. Tr. V at 418. Holliday first saw the faxed memo naming Taylor a temporary steward to replace Pat Dumaw, CX 3, RX 28, shortly after he laid off Dumaw. Ibid. Holliday had assumed that with only four Teamsters assigned to Foster Wheeler, Southwick was still the steward. Tr. V at 389. Dumaw had never told Holliday that he had named Pat Dumaw steward. Ibid. When he looked at the letter naming Pat Dumaw as steward, CX 49, together with the fax log, RX 14, which showed attempts to fax to Foster Wheeler on July 15 and 17, Holliday concluded that

> Dennis found out that his brother had been laid off on Friday. On Saturday, then, manufactured a letter and backdated it to the day of layoff in an attempt to make Pat a steward for the purposes of improved job opportunity or employment at Foster Wheeler.

Tr. V at 392. Holliday's view that Dumaw had manufactured a backdated letter naming Pat Dumaw as steward at Foster Wheeler led him to review other dispatches of Pat Dumaw. Ibid. Because Pat Dumaw had been the steward at Flowery Trail, but was not the last Teamster laid off from that job, Holliday formed the opinion that Dumaw had moved Pat Dumaw from Flowery Trail to Foster Wheeler. Tr. V at 397, 398, 485-487. The Flowery Trail job lasted about another month after Pat Dumaw left there, but Holliday saw no evidence that Dumaw named another steward. This caused Holliday concern "[b]ecause I was seeing the same pattern that I had seen in the previous Business Agent, that of favoritism and/or nepotism." It would be to Pat Dumaw's advantage to be transferred to the Foster Wheeler job because it was a long-term job. Tr. V at

399. Holliday also concluded that the entry of Pat Dumaw's name above Bob Bailey's on the dispatch sheet, RX 17, was an attempt to manufacture evidence that Pat Dumaw was called ahead of Bailey, and sloppy bookkeeping. Tr. V at 401-402, 472, 477-478. Similarly, when he saw that Pat Dumaw's name on the July sign-in sheet had been inserted on July 16, a weekend, RX 25, "[i]t was apparent to me that again something was done after the fact to benefit Pat Dumaw in the order in which he could be dispatched." Tr. V at 406.

Holliday requested Ed Jacobson to assist him in his investigation because Jacobson had been instrumental in the investigation of Anderson. Tr. V at 387-388. Jacobson had limited time available, but said he would come over when he could. Tr. V at 388. Jacobson interviewed Dennis Wood regarding Pat Dumaw's layoff from Contractor's Equipment. Jacobson reported to Holliday "that Mr. Wood had been contacted by a Business Agent, Dennis Dumaw, requesting the layoff of his brother on Friday." Tr. V at 409. This caused Holliday concern because, "Again we're seeing a severe case of manipulating the hiring procedures for the local." Tr. V at 410. Sometime in September, Holliday called Blankingship to inquire whether Blankingship had asked for Pat Dumaw by name; Blankingship said he just needed a Teamster. Tr. V at 411-412. That told Holliday "that Dennis had once again . . . manipulated the list, requested a layoff so that he could then fill that dispatch improperly with his brother going back to Foster Wheeler." Tr. V at 413. Holliday testified that he had never spoken to Blankingship before this call, and had never before met or spoken to anyone in a management position at Foster Wheeler. Tr. V at 414.

During Holliday's investigation of Dumaw, Mel Cabett, another Teamster, filed a complaint with the NLRB alleging that although he was high on the list, Local 690 had not dispatched him all summer. Tr. V at 414. Cabett told Holliday he thought he was being punished for being on Holliday's opposition for an election. Tr. V at 415. When Holliday looked at the hiring hall lists, he learned that Cabett's "name had been in the top four or five without a dispatch to him for approximately three months." Tr. V at 416. There was no written explanation in the records. Tr. V at 416, 518. The NLRB eventually notified Local 690 that Cabett had withdrawn his charge. Tr. V at 417. On cross examination of Holliday, counsel for the Complainant suggested that Cabett was working as a "salt" (working a non-union job by agreement), and that he declined a referral to Foster Wheeler, Tr. V at 494-496. The evidence regarding the validity of Cabett's NLRB claim was insufficiently developed for me to draw any conclusion based on it.

Holliday testified that he tried to contact Dumaw several times beginning in mid-August. He finally reached him in September when he called to dispatch Dumaw to a job, and they spoke about the investigation on the next day, a Saturday. Tr. I at 145; Tr. V at 418-419, 448-449, 452-453. Dumaw testified that Holliday dispatched him to a driving job in early September 2000. The driving job lasted seven to nine days. Tr. I at 145. Dumaw confirmed that Holliday called him at home and asked him some questions about dispatching Pat Dumaw to Foster Wheeler from the Flowery Trail job and from the Contractor's Equipment job. He said the conversation lasted a minute or two. Tr. I at 108-109; 121; 258-259. Holliday characterized Dumaw's responses to his questions as "incomplete" and "vague"; he said Dumaw never gave satisfactory answers to his questions. Tr. V at 420. Dumaw asked at the time whether he was laid off or terminated from his

job as a Business Agent; Holliday told him he was still on layoff. Tr. I at 144. Holliday told him he was continuing to check things out and would get back to him. Tr. I at 259.

On October 2, 2000, Holliday sent Dumaw a letter which stated:

> I am informed that you have obtained work elsewhere and believe this is for the best, under the circumstances. The purpose of this letter is to forward your final check in the amount of $3,444.09 (computations enclosed).

CX 32. Holliday testified that he drafted the letter as he did, without listing his concerns, because the Department of Labor charges had been filed in August and the matter was going to be in litigation. In addition, he had been told Dumaw was in the process of filing for unemployment compensation, and the union was not going to protest; the letter would give Dumaw something to submit for unemployment. Tr. V at 421. Holliday testified that he did not know Dumaw was no longer working on the driving job when he sent Dumaw the letter. Tr. II at 411; Tr. V at 422. Counsel for Complainant argues that the absence of detailed reasons for the discharge in the termination letter, such as were given to Anderson, means that the reasons now given for Dumaw's discharge are pretextual, *see* Complainant's Final Brief at 25-27. I find, however, that Holliday offered a credible explanation for the brevity of Dumaw's termination letter and decline to draw the inference urged by the Complainant.

On October 27, 2000, Jacobson wrote a letter to Holliday summarizing the results of his investigation of Local 690's dispatches for the year 2000 up to September. Jacobson found many of Dumaw's dispatches "questionable" due to poor record-keeping. RX 8. Holliday could not recall how much of the information discussed in the letter Jacobson may have told him before he terminated Dumaw. Tr. V at 516.

Counsel for the Complainant argues in his Final Brief at 15-16 that Holliday's testimony regarding his investigation should be disregarded as unreliable hearsay. I disagree. Part of Holliday's investigation involved his own review of dispatch and other union records. Moreover, as counsel concedes, both parties introduced hearsay evidence in accordance with my ruling that hearsay would generally be admissible, *see* Tr. I at 78-79. Strict rules of evidence do not apply to these proceedings. *See* 5 U.S.C. § 556(d); 29 CFR § 24.6(e); *Calhoun v. Bailer*, 626 F.2d 145, 148 (9th Cir. 1980). Further, as Local 690 pointed out in its Reply Brief at 18, an out of court statement may be hearsay for some purposes, i.e., if offered for its truth, but not for other purposes, e.g., if offered to show that the statement was made. *See* Fed.R.Evid. 801(c); *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1456 (9th Cir. 1983). Like the testimony by Lockheed management regarding third party complaints about Haddad at issue in that case, information Holliday received from others as part of his investigation is not hearsay, and is relevant in demonstrating Holliday's intent. I found Holliday's description of his investigation to be credible, and the conclusions he drew to be reasonable based on the information available to him.

Holliday said he was the sole decision-maker who decided to lay off and discharge Dumaw. Tr. V at 425. Holliday denied that anyone within Local 690 ever complained to him that Dumaw was protecting Taylor's rights as a whistleblower. Ibid. He also denied that Imes or Southwick ever made any complaints to him about Taylor. Tr. V at 423, 512. He denied that anyone employed by Foster Wheeler ever complained that Dumaw was protecting Taylor's rights, and reiterated that he had never met or spoken to anyone in management at Foster Wheeler, other than one conversation with Blankingship in which Taylor's name never came up. Ibid.; Tr. V at 425, 427. He said he heard nothing negative from anyone at Foster Wheeler about Taylor or Dumaw. Tr. V at 425, 512. He denied that Taylor's position as a whistleblower played any role in his decision to fire Dumaw. Tr. II at 412; Tr. V at 423. There is no evidence to the contrary. The Complainant's theory that Holliday was part of a conspiracy to discriminate against him because of his support of Taylor is speculative, and not supported by the evidence.

Dumaw took the letter to mean he was terminated from his job as a Business Agent. Tr. I at 145. He was never provided with the results of Holliday's investigation or charged with nepotism by the Local. Tr. I at 145-146.

Taylor continued as the steward at Foster Wheeler until he and all other Teamsters were laid off for a few days beginning September 15. Tr. II at 494. He was recalled in October, but was no longer the steward. Ibid. He was still working at Foster Wheeler when he testified at the hearing (July 11, 2001). Tr. II at 517.

OSHA completed its investigation of Dumaw's complaint on December 11, 2000, concluding that Dumaw had not established that he was discharged in retaliation for protected activity. RX 3. Dumaw has never been called to any proceeding to testify on behalf of Taylor. Tr. II at 289.

Dumaw offered testimony from several fellow Teamsters to establish that he had done a good job as a Business Agent and that members did not complain about him as they did about Anderson. *See* testimony of Jennifer Tiffany, Tr. IV at 146 et seq.; Robert Atkins, Tr. IV at 214 et seq.; and Jay Hoffman, Tr. IV at 230 et seq.

II. THRESHOLD LEGAL ISSUES OF JURISDICTION, COVERAGE AND STANDING

A. Jurisdiction over Dumaw's claims based on the International Safe Container Act and the Occupational Health and Safety Act

In his complaint filed with OSHA, Dumaw alleged violation of the International Safe Container Act, 46 App. U.S.C. § 1506, and the Occupational Safety and Health Act, 29 U.S.C. § 660. Trials pursuant to these two statutes are conducted by U.S. District Courts upon complaints filed by the Secretary of Labor if the Secretary determines that the employee protection provision has been violated. 46 App. U.S.C. § 1506(c); 29 U.S.C. § 660(c)(2). Unlike the other statutes invoked by Dumaw, there is no provision in either statute for an employee to appeal an

unfavorable decision by the Secretary of Labor to OALJ for adjudication. For this reason, OALJ does not have jurisdiction over such complaints. Dumaw's claims made pursuant to the International Safe Container Act and the Occupational Safety and Health Act will not be addressed further in this Recommended Decision and Order.

B. Dumaw's standing to bring claims under the Federal Water Pollution Control Act and the Safe Drinking Water Act

Because Dumaw's claim of whistleblower protection is based upon his support of Taylor, rather than any whistleblowing activity on his own part, I concur with the conclusion of the Regional Administrator that Dumaw may seek protection only of whistleblower statutes invoked by Taylor. Documentation of Taylor's whistleblower complaints made before he was employed by Foster Wheeler was not made part of the record. Taylor testified that the bases for his whistleblower claims were the Energy Reorganization Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act), the Toxic Substances Control Act, and the Surface Transportation Assistance Act [42 U.S.C. § 31105], the same as those he later raised against Foster Wheeler. Tr. II at 475, 515; *see also* the OSHA determination on Taylor's claim, CX 51. I conclude that Dumaw may not maintain his claim under the Safe Drinking Water Act or the Federal Water Pollution Control Act because Taylor did not invoke either statute. Moreover, Dumaw did not allege a violation of the Surface Transportation Assistance Act in his own complaint, or raise it at any stage of the proceedings, so it is not at issue either. *See Roberts v. Rivas Environmental Consultants, Inc.*, USDOL/OALJ Reporter (HTML), ARB No. 1997-026, ALJ No. 1996-CER-1 (ARB Sept. 17, 1997) (Claim pursuant to the Comprehensive Environmental Response, Compensation and Liability Act dismissed because complaint filed with OSHA did not allege violation of that Act); *Trachman v. Orkin Exterminating Company, Inc.*, USDOL/OALJ Reporter (HTML), ALJ No. 2000-TSC-3 at 2-3 (ALJ July 12, 2001) (Determination by the Office of Administrator of the Wage and Hour Division referred only to the Toxic Substances Control Act and the Clean Air Act; complainant could not invoke other environmental employee protection statutes after hearing).[20] As is discussed above, OALJ does not have jurisdiction over claims under the whistleblower provisions of the Occupational Safety and Health Act or the International Safe Container Act. Thus it follows that of the eight statutory bases alleged by Dumaw in his complaint to OSHA, only four remain to be addressed: (1.) the Energy Reorganization Act; (2.) the Comprehensive Environmental Response, Compensation and Liability Act; (3.) the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act); and (4.) the Toxic Substances Control Act.

C. Coverage and Standing under the Energy Reorganization Act ("ERA")

Section 211 (formerly section 210) of the Energy Reorganization Act, 42 U.S.C. § 5851,

[20]These decisions and any others cited to the USDOL/OALJ Reporter are published on the Department of Labor's World Wide Web site at www.oalj.dol.gov.

encourages employees in the nuclear industry to report safety violations and provides a mechanism for protecting them against retaliation for doing so. *See English v. General Electric Co.*, 496 U.S. 72, 82 (1990). That section states:

> (a) Discrimination against employee.
>
> (1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--
> (A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.);
> (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (E) testified or is about to testify in any such proceeding or;
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.
>
> (2) For purposes of this section, the term "employer" includes--
> (A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. § 2021);
> (B) an applicant for a license from the Commission or such an agreement State;
> (C) a contractor or subcontractor of such a licensee or applicant; and
> (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. § 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344 [Naval Nuclear Propulsion Program].
>
> (b) Complaint, filing and notification
>
> (1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination.. . .

Foster Wheeler does not contest that it is an employer as defined in the ERA. However, OSHA found, and Foster Wheeler argued in its Post-Hearing Brief, that Dumaw cannot maintain a complaint against Foster Wheeler under the ERA because Foster Wheeler was not **his** employer. As Foster Wheeler acknowledged in its brief, citing *Landers v. Commonwealth Lord Joint Venture*, 83-ERA-5 at 4-5, 1983 WL 189790 (ALJ May 11, 1983, adopted by the Sec'y of Labor, Sept. 9, 1983), the term "employee" in the ERA has been broadly construed. In *Landers*, the ALJ found that General Electric could be held responsible under the ERA for the discharge of a contract employee employed by another company to work on a project at the Marble Hill nuclear power facility, because a liberal construction of the term "employee" is necessary to prevent employers from engaging in acts of discrimination against whistleblowers.

Numerous cases support the proposition that a complainant need not be a direct employee of the charged employer for that employer to be subject to an ERA claim. *See, e.g., Dysert v. Florida Power Corp.*, USDOL/OALJ Reporter (HTML), ALJ No. 1993-ERA-21 (Sec'y Aug. 7, 1995), *aff'd sub nom. Dysert v. U.S. Dept. of Labor*, 105 F3d. 607 (11th Cir. 1997); *St. Laurent v. Britz, Inc.*, USDOL/OALJ Reporter (HTML), ALJ No. 1989-ERA-15 at 2 (Sec'y Oct. 26, 1992); *Hadden v. Georgia Power Co.*, USDOL/OALJ Reporter (HTML), ALJ No. 1989-ERA-21 at 10-11(ALJ May 21, 1990, affirmed by the Sec'y, Feb. 9, 1994); *Hill v. TVA*, USDOL/OALJ Reporter (HTML), ALJ No.1987-ERA-23 and 24 (Sec'y May 24, 1989). In all of these cases, as well as *Landers*, the employees in question were employed by a contractor or sub-contractor of the owner or operator to work on-site at power plants. In this context, Secretary Dole stated in *Hill* that the Act is not limited in its terms to prohibit discrimination against any specific employer's employees, or to its own employees, and permits the filing of a complaint by "*any* employee, who believes he has been discriminated against by *any person*" in violation of the Act. (Emphasis added). *Hill* at 2. In support of her position, she cited the legislative history and various cases construing the ERA and other anti-retaliation statutes to broadly to effectuate their remedial purposes, emphasizing the potentially catastrophic effects if employees are intimidated into remaining silent. *Hill* at 2-3. She also observed:

> Although the ERA contains no separate definition of "employee", the NLRA, after which the ERA was patterned, defines "employee" as "any employee, and shall not be limited to the employees of a particular employer, unless . . . stated otherwise . . of 29 U.S.C. §§ 152 (1982). The Supreme Court has long recognized that "[t]he broad [NLRA] definition of 'employee'. expressed the conviction of Congress 'that disputes may arise regardless of the proximate relation of employer and employee, [...],' H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 9 . . . ." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 192 (1941). The Court reiterated this view in *Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976), noting with approval the NLRB's interpretation of the NLRA that "a statutory 'employer' may violate § 8(a)(1) with respect to employees other than his own. See *Austin Co.*, 101 N.L.R.B. 1257, 1258-1259. . . . ." 424 U.S. at 510, n.3.

Hill at 4-5. The Secretary went on to cite similar interpretations in cases alleging third party interference with employment under the National Labor Relations Act and Title VII of the Civil

Rights Act of 1964, and cases brought by applicants for employment and former employees under the ERA. *Hill* at 5-6.

I have not been able to find any cases construing the whistleblower statutes in a situation like the case at hand, where the Complainant is an employee of a union alleging interference with his employment by a third party employer. Nonetheless, based on the *Hill* rationale, I conclude that Dumaw's ERA claim against Foster Wheeler is not precluded by the fact that Foster Wheeler was not his employer.

Local 690 argues that it is not an "employer" covered by the ERA because it is not a "licensee," an "applicant for a license," a "contractor" or a "subcontractor" within the meaning of 42 U.S.C. § 5851(a)(2). Local 690 relies on the cases of *Delcore v. International Brotherhood of Electrical Workers*, USDOL/OALJ Reporter (HTML), ALJ No. 1991-ERA-7 (ALJ Dec. 4, 1990, affirmed by the Sec'y, July 21, 1994) (Respondent union not an "employer" covered by the ERA), and *Flanagan v. Bechtel Power Corp.*, 81-ERA-7 (Sec'y June 27, 1986) (Union building trades representative not an "employer" under ERA, dismissal affirmed). Although it appears from the context that the complainants in those cases were union members, but not union employees, nonetheless I conclude that this argument is well taken. *See Adams v. Dole*, 927 F.2d 771 (4th Cir. 1991) (Upholding decision of Secretary of Labor to dismiss whistleblower claims by employees of contractors of a government-owned facility under the pre-1992 definition of "employer"); *Bricker v. Rockwell International Corp.*, 10 F.3d 598, 600-602 (9th Cir. 1993) (Congress' failure to provide whistleblower protection of employees at government-owned nuclear facilities in original legislation not inadvertent, 1992 amendments to ERA which added such protection apply only prospectively); *Billings v. Office of Workers' Compensation Programs*, USDOL/OALJ Reporter (HTML), ALJ No. 1991-ERA 35 at 2 (Sec'y Sept. 24, 1991) ("Employers under the ERA are licensees, or applicants for a license, of the Nuclear Regulatory Commission . . . and their contractors and subcontractors.")

The *Adams* court found the use of the word "including" in the original Act ("No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee . . .") to be ambiguous, 927 F.2d at 775, and decided that the original language was definitional, meant to exclude, not include, entities not listed, 927 F.2d at 776-777. At least one ALJ has concluded that the revised language now found in section 211(a)(2) (". . . the term 'employer' includes--(A) a licensee of the Commission or of an agreement State . . . ; (B) an applicant for a license from the Commission or such an agreement State; (C) a contractor or subcontractor of such a licensee or applicant; and (D) a contractor or subcontractor of the Department of Energy") is "plain language . . . clearly not restricted to licensees or contractors or subcontractors of licensees." *Jayco v. Ohio Environmental Protection Agency*, USDOL/OALJ Reporter (HTML), ALJ No. 1999-CAA-5 at 63 (ALJ Oct. 2, 2000). I cannot agree that the word "includes" is now unambiguous and merely illustrative, an interpretation of "including" rejected in *Adams*. While this interpretation would avoid the anomaly that Foster Wheeler could be held responsible for discriminating against Dumaw, while Local 690, his actual employer, could not, I conclude I am bound by the precedent

from the earlier cases. *Accord, see Williams v. Y-12 Nuclear Weapons Plant*, USDOL/OALJ Reporter (HTML), ALJ No. 1995-CAA-10 at 3 (ALJ Aug. 2, 1995) ("The amendments to the ERA only changed the word 'including' to the word 'includes.' Thus, I interpret the word 'includes' as restricting and defining the term employer.")

The terms "licensee" and "applicant for a license" in the current definition of "employer" refer to the licensing required to build or operate nuclear reactors. There is no evidence that Local 690 is the holder of or applicant for such a license. The terms "contractor" and "subcontractor" refer to entities, like Foster Wheeler, entering into contracts to build, operate or perform other work for owners or operators of nuclear plants. The fact that a union enters into a collective bargaining agreement like the HSSA does not make it a "contractor" or "subcontractor" in the sense of the words as they are used in section 211(a)(2). I conclude that Local 690 is not an "employer" within the meaning of the Act.

Local 690 also argues that Dumaw, as a whistleblower's representative, but not a whistleblower himself, does not have standing to maintain a claim under the ERA. The legislative history of the whistleblower provision suggests otherwise. The Senate Report stated, "Under this section, employees and union officials could help assure that employers do not violate requirements of the Atomic Energy Act. . . . The section would prohibit any firing or discrimination and would provide an administrative procedure under which the employee or his representative could seek redress for any violation of this prohibition. . . ." Senate Report No. 95-848, 1978 U.S. Code Congressional and Administrative News 7303 at 7304. Dumaw's allegation that he refused to participate in discrimination against Taylor falls within the protection for an employee who "refused to engage in any practice made unlawful by this chapter" in 42 U.S.C. § 5851(a)(1)(B). Dumaw testified that he has never been called to any proceeding to testify on behalf of Taylor. Nevertheless, he did provide written declarations to Taylor recounting discriminatory acts by various company and union officials. His written declarations constitute protected activity as testimony, assistance and/or participation in Taylor's claim under 42 U.S.C. § 5851(a)(1)(E) and/or (F), i.e., by providing the written declarations, Dumaw "testified or was about to testify," and "assisted or participated or was about to assist or participate in a proceeding under the Act" instituted by Taylor. Finally, Dumaw filed an ERA claim on his own behalf after he was laid off, but before he was terminated. That also constituted protected activity, as he "commenced, caused to be commenced, or [was] about to commence or cause to be commenced a proceeding" under 42 U.S.C. § 5851(a)(1)(D). Under the circumstances of this case, therefore, I find that Dumaw does have standing to file a claim pursuant to the ERA.

In summary, I conclude that Dumaw has standing to bring a claim under the ERA, and that Foster Wheeler is a covered employer, but Local 690 is not.

D. Coverage and standing under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act) ("SWDA/RCRA")

CERCLA was enacted "to provide for liability, compensation, cleanup and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." Pub. L. 96-510, 94 Stat. 2767 (1980). The employee protection provision of CERCLA, 42 U.S.C. § 9610(a), provides:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

SWDA/RCRA was enacted to provide assistance for recovery of energy and resources from discarded materials and safe disposal of solid waste, and to regulate disposal of hazardous waste. *See* Pub. L. 94-580, 90 Stat. 2824 (1976). The employee protection provision of SWDA/RCRA, 42 U.S.C. § 6971(a), provides:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

Foster Wheeler argues that this language means that Dumaw must have provided information or filed a whistleblower action under CERCLA and/or SWDA/RCRA in order to maintain a claim. Post-Hearing Brief at 8. Foster Wheeler cited no precedent in support of this argument, and I have found none. This narrow interpretation of the statutory language would exclude from protection employee representatives who allege, as Dumaw did, that they were targets of discrimination because of the whistleblowing activities of the employees they represent. That cannot be the intent of either law. Furthermore, in addition to acting as Taylor's representative, Dumaw provided written declarations to Taylor for his use in his own whistleblower complaint, and eventually filed his own complaint. I find that such actions also come within the ambit of protected activity described by CERCLA and SWDA/RCRA.

Both CERCLA and SWDA/RCRA prohibit discrimination by any "person" against "any employee or any authorized representative of employees," and authorize "[a]ny employee or a representative of employees who believes that he has been fired . . . by any person" to file a claim with the Secretary of Labor. 42 U.S.C. § 9610(a) and (b) and 42 U.S.C. § 6971(a) and (b). CERCLA defines a "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21).

Similarly, SWDA/RCRA defines a "person" as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States." 42 U.S.C. §6903(15).

Local 690 argued in its Brief in Support of Motion for Summary Decision that the failure to expressly include labor unions in these definitions of "person" evidenced a lack of intent on the part of Congress that labor unions be covered by CERCLA and SWDA/RCRA. I can find no reported decision under either CERCLA or the SWDA/RCRA at any level addressing this issue. The word "association" is broad enough to encompass a labor union, *see Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 460, 498 (1957) ("The great majority of labor unions are unincorporated associations . . ."), so the statutes are subject to interpretation on this point.

To support its argument that labor unions are not included in the definition of "person," Local 690 points to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(a), the Americans with Disabilities Act, 42 U.S.C. § 12203, 12111(7) and the Age Discrimination in Employment Act, 29 U.S.C. § 623(d), all of which expressly include labor unions in the definition of "person." In CERCLA and SWDA/RCRA, however, the definition of "person" is not part of the employee protection provision; rather, it is in the section containing definitions for the entire statute. Because the definitions were drafted in the context of the overall environmental purpose of the statutes, and not in the context of the employee protection provisions, I do not find the comparison to the definition of "person" in other anti-discrimination statutes persuasive. Similarly, the principles of statutory construction cited by Local 690 in support of its argument are taken from different contexts, not applicable to the case at hand. Local 690 cites *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995) for the proposition, "Where Congress knows how to say something, but chooses not to, its silence is controlling." The discussion and case citations which relate to that statement show that the *Haas* court was comparing language in different sections of the same statute. *See* 48 F.3d at 1156-1157. Similarly, in *U.S. v. Trident Seafoods Corp.*, 92 F.3d 855, 862, 864 (9th Cir. 1996), when the court said that "Congress must be presumed to have known of its former legislation and to have passed new laws in view of the provision of the legislation already enacted," it was in the context of an attempt by the government to avoid payment of costs under the Equal Access to Justice Act in a Clean Air Act case, because the Clean Air Act gave a different standard for the recovery of costs. Thus neither case is on point to support Local 690's argument that the omission of labor unions from the definition of "person" was purposeful.

In the absence of any cases addressing the issue, I looked to the legislative history. I found no references to the employee protection provision of CERCLA in the legislative history. The legislative history of SWDA/RCRA indicates that the employee protection provision was considered "a standard employee protection provision" which "(a) prohibits an employer from discharging any employee . . . because such employee commenced . . . a legal proceeding . . .testified . . . assisted . . . or participate[d] in any proceeding" and "(b) gives an employee

discharged . . . because of participation in [such] activity a remedy." House Report 94-1491, 1976 U.S. Code Congressional and Administrative News 6238 at 6245 and 6306. Neither CERCLA nor SWDA/RCRA defines the terms "employer" or "employee." I conclude that CERCLA and SWDA/RCRA, like the ERA, should be interpreted broadly to effectuate their purposes.

In summary, I conclude that Dumaw has standing to bring a claim under the CERCLA and SWDA/RCRA, and that Foster Wheeler and Local 690 are covered "persons" under both statutes.

E. Coverage and standing under the Toxic Substances Control Act ("TSCA")

The Toxic Substance Control Act was enacted to protect human health and the environment by requiring testing and restrictions in the manufacture, processing, distribution, use, or disposal of chemical substances. *See* Pub. L. 94-469, 90 Stat. 2003 (1976). The employee protection provision of TSCA, 15 U.S.C. § 2622(a), provides:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has–
> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;
> (2) testified or is about to testify in any such proceeding; or
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

In its Brief in Support of Summary Judgement, Local 690 argued that this provision does not extend protective coverage to "employee representatives," relying on the language of the statute and *Slavin v. Pacific Northwest National Laboratory*, USDOL/OALJ Reporter (HTML), ALJ No. 2000-ERA-26 (ALJ Sept. 8, 2000). Slavin was a representative of complainants in whistleblower proceedings, but was never an employee of any of the respondents, and never participated in the proceedings as a witness. Dumaw, on the other hand, was an employee of Local 690, one of the respondents in this case. Furthermore, before his layoff, Dumaw provided written declarations to Taylor in support of Taylor's whistleblower complaint, and after his layoff and before his discharge, Dumaw commenced a TSCA proceeding on his own behalf. Thus Dumaw is protected by the terms of TSCA as an employee who commenced, testified and/or assisted or participated in a proceeding. *Slavin* is distinguishable on its facts.

I conclude that Dumaw has standing to bring a claim under TSCA. TSCA does not contain definitions of the terms "person," "employer" or "employee." Neither respondent challenged whether it is covered by TSCA, and I conclude that both are covered. Local 690 is a covered employer because it was Dumaw's employer. Foster Wheeler is covered because it

allegedly interfered with Dumaw's employment by Local 690. *See Stephenson v. National Aeronautics & Space Administration*, USDOL/OALJ Reporter (HTML), ARB No. 1996-80, ALJ No. 1994-TSC-5 (ARB Apr. 7, 1997); *Hill v. TVA*, USDOL/OALJ Reporter (HTML), ALJ No. 1987-ERA-23 and 24 (Sec'y May 24, 1989).

III. THE MERITS OF THE CLAIM

In order to prevail on his claim, Dumaw must establish by a preponderance of the evidence that either or both of the respondents took adverse employment action against him because he engaged in protected activity. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq and other anti-discrimination statutes. *See Overall v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML), ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001), citing, inter alia, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). When direct evidence of discrimination is not available, a complainant first must create an inference of unlawful discrimination by establishing a prima facie case of discrimination, by showing that the respondent is subject to the Act; that the complainant engaged in protected activity; that he suffered adverse employment action; and that a nexus exists between the protected activity and adverse action. The complainant must show that the respondent had knowledge of the protected activity to establish a prima facie case. *See Bartlik v. U.S. Dept. of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796 (9th Cir. 1982); 29 CFR § 24.5(a)(2). The burden then shifts to the respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. Under the traditional Title VII analysis applicable to CERCLA, SWDA/RCRA and TSCA, the burden of persuasion remains at all times with the complainant, who must prove by a preponderance of the evidence that the respondent's proffered reasons were not the true reasons and constitute a pretext for discrimination. *Burdine*, 450 U.S. at 253. Under the ERA, which contains an affirmative defense which the other whistleblower statutes do not, once a complainant has made a showing that protected activity "was a contributing factor" in the adverse action, the burden of persuasion shifts to the employer to demonstrate "by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior." 42 U.S.C. § 5851(b)(3)(A) and (B). This defense appears to be a statutory adoption of the dual motive analysis in *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977). I do not reach this defense in this Recommended Decision and Order in view of my conclusion that Dumaw has failed to establish a prima facie case of discrimination against Foster Wheeler, the only respondent covered by the ERA. Nor does the evidence support a conclusion that Local 690 had a dual motive in discharging Dumaw, so the *Mt. Healthy* analysis does not apply. For the reasons stated above, I have concluded that Foster Wheeler is subject to the ERA, CERCLA, SWDA/RCRA and TSCA; and Local 690 is subject to CERCLA, SWDA/RCRA and

TSCA. Discussion of the remaining elements of proof follows.

A. Protected Activity

Dumaw has established that he engaged in protected activity when he refused to discriminate against Taylor, referring him to the Foster Wheeler job despite the opposition of Southwick and Blankingship. Dumaw also engaged in protected activity when he provided two written declarations to Taylor in support of Taylor's whistleblower complaint against Foster Wheeler. Dumaw also engaged in protected activity when he filed his own whistleblower complaint against Foster Wheeler and Local 690.

B. Adverse Action

Local 690 took adverse action against Dumaw when Holliday laid him off from his position as a Business Agent on August 3, 2000, and terminated him from the position on October 2, 2000.

There is no evidence that Foster Wheeler took any adverse action against Dumaw. Holliday testified that he was the sole decision-maker on behalf of Local 690. He decided to lay off Dumaw, and later to terminate him. Holliday testified that he had only one conversation with Blankingship, about the request for a Teamster in July that led to the referral of Pat Dumaw. He said he had no other conversations with anyone in authority at Foster Wheeler, and noone from Foster Wheeler spoke to him about Taylor or Dennis Dumaw. That testimony is uncontradicted. Because Dumaw failed to establish that Foster Wheeler played any role in the adverse action taken against him, the claim against Foster Wheeler should be dismissed. *See Doyle v. Bartlett Nuclear Services*, USDOL/OALJ Reporter (HTML), ALJ No. 1989-ERA-18 (Sec'y May 22, 1990), *aff'd sub nom. Doyle v. Secretary, U.S. Dept. of Labor*, 949 F.2d 1161 (11th Cir. 1991); *Saporito v. Florida Power & Light Co.*, USDOL/OALJ Reporter (HTML), ALJ No. 1993-ERA-23 (Sec'y Sept. 7, 1995).

C. Nexus between the protected activity and adverse action by Local 690

Dumaw dispatched Taylor to work for Foster Wheeler on May 16, 2000. Dumaw was laid off on August 3, 2000, and terminated on October 2, 2000. The entire sequence of events at issue in this case transpired over a period of four and one-half months. "Proximity in time is sufficient to raise an inference of causation." *Bechtel Construction Co. v. Sec'y of Labor*, 50 F.3d 926, 934 (11th Cir. 1995), citing *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). Holliday's testimony that he did not know Taylor, and was not familiar with his history as a whistleblower, when he laid off Dumaw, is consistent with Taylor's testimony and the fact that Taylor's whistleblowing activity took place before Local 690 had responsibility for Hanford. There is no evidence to the contrary. Absent such knowledge, there can be no nexus between Dumaw's protected activity and Holliday's decision to lay him off pending investigation. The record is unclear as to precisely when Holliday learned of Taylor's status as a whistleblower, and Dumaw's

allegations that he had been laid off because of his support of Taylor. Nonetheless, by the time Holliday made the decision to discharge Dumaw, Dumaw had filed his own whistleblower claim, which recited that information. Holliday cited the existence of Dumaw's whistleblower claim as one of the reasons for the brevity of the termination letter. I find that Holliday knew of at least some of Dumaw's protected activity (opposing discrimination against Taylor, and filing his own claim) when Holliday made the decision to terminate Dumaw's employment with Local 690, and that the sequence of events is sufficient to establish the required nexus.

D. Local 690's articulated reasons for terminating Dumaw

Local 690 has articulated Dumaw's pattern of preferential treatment of his brother, Pat Dumaw, and other irregularities in his work as a Business Agent, as the reasons for his discharge. Those actions include referring Pat Dumaw to Foster Wheeler before the Flowery Trail job was completed even though Pat Dumaw was a steward at Flowery Trail; writing Pat Dumaw's name above Bob Bailey's on the Foster Wheeler dispatch record; asking Dennis Wood to lay off Pat Dumaw from the Contractors' Equipment job so he could be referred back to Foster Wheeler; attempting to name Pat Dumaw steward of the Foster Wheeler job after he had been laid off from Foster Wheeler the second time; writing Pat Dumaw's name between the lines on the sign-in sheet; naming Taylor as steward at Foster Wheeler, even though Taylor had not been approved by the board of Local 690; assigning grievances filed on behalf of Pat Dumaw to Kenck, a non-construction Business Agent, without consulting Holliday; and filing unsupportable grievances over Pat Dumaw's layoff and Wolleat's dispatch. I find that Local 690 has met its burden to produce evidence of legitimate, non-discriminatory reasons for its actions.

E. Pretext

Dumaw has failed to establish that the reasons Local 690 has given for his discharge are a pretext for discrimination. The August 2000 letter to Buck Holliday and the Local 690 Executive Board signed by Pat Dumaw, in which he and Dennis Dumaw attempted to justify the dispatches to Hanford, RX 36, supports Holliday's testimony that he was concerned early in his investigation that Dennis Dumaw was showing favoritism to Pat Dumaw. The fact that Dumaw's predecessor, Anderson, was discharged for favoritism in dispatching, lends credence to Local 690's position that favoritism was the reason for discharging Dumaw. The cumulative evidence that Holliday uncovered during his investigation that Dennis Dumaw had shown favoritism to Pat Dumaw was compelling. Whistleblower statutes are not intended to shield employees from the consequences of their own misconduct. *Trimmer v. U.S. Dept. of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999). Dumaw denies that he did anything improper in referring his brother to Foster Wheeler or handling grievances. Even if I accepted his explanations, for example, that the irregularities in the dispatch form and sign-in sheet were innocent errors, that his referrals did not intentionally violate the rules, and that he did not know that Pat Dumaw had been laid off when he named him to be steward, it would not change my conclusion that Holliday had reasonable grounds for concluding that Dumaw had engaged in misconduct based on the evidence available to him.

Furthermore, even though I find that Dumaw established that Southwick and Blankingship exhibited animus against Taylor because he is a whistleblower, I also find that there is no evidence that either of them played any role in Holliday's decision to discharge Dumaw, or that Holliday shared their animus against Taylor. "[A]n employer may discharge an employee who has engaged in protected conduct as long as the employer's decision to discharge the employee is not motivated by retaliatory animus and the employer has reasonable grounds for the discharge." *Lockert v. U.S. Dept. of Labor*, 867 F.2d 513, 519 (9th Cir. 1989). Nor does the evidence support a conclusion that Holliday was acting as a "cat's paw" of others acting from a retaliatory motive. *See Gee v. Principi*, 2002 WL 597374 at *2 (5th Cir. April 18, 2002). Although I have credited Dumaw's testimony that Imes objected to Taylor's whistleblowing activities, given the sequence of events, the conclusion is inescapable that the conflict between Dumaw and Imes arose because Imes insisted on dispatching Wolleat even though Pat Dumaw was on lay-off. To the extent that Holliday relied on Imes for information on which he based his decision to lay off Dumaw, I find that Imes was motivated by his anger over Dumaw's refusal to complete the dispatch of Wolleat, and filing a grievance over it, rather than any animus Imes may have harbored against Taylor. Moreover, once Holliday conducted his investigation, he had reason to believe that Dumaw had engaged in a course of conduct violating the dispatch rules on behalf of his brother. Some of the incidents Holliday relied upon could have been interpreted more innocently. The inquiry in such a case, however, is not whether the employee was guilty of misconduct, but whether the employer believed in good faith that the employee had done wrong, and that belief was the reason for termination. *See Equal Employment Opportunity Commission v. Total System Services, Inc.*, 221 F.3d 1171, 1176 (11th Cir. 2000); *Waggoner v. City of Garland, Texas*, 987 F.2d 1160, 1165-1166 (5th Cir. 1993)*; Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

Several members of Local 690 testified that Dumaw was a very good Business Agent. Dumaw testified that his son and cousin were also members of Local 690, but he was never accused of showing favoritism toward them. Tr. II at 328. That generally favorable testimony does not overcome the specific instances of apparent favoritism toward Pat Dumaw relied on by Holliday. Moreover, even Dumaw and some of those who testified on his behalf agreed that it would be improper to take a person off a short-term job to send him to a long-term job (Dumaw, Tr. I at 216; Harvey, Tr. IV at 213; Taylor, Tr. II at 567-568), or that a Business Agent who dispatches based on friendship or family relations should not be employed by the union (Atkins, Tr. IV at 221). Holliday had evidence that could reasonably be interpreted to show that Dumaw had engaged in such conduct, and thus a legitimate reason for terminating him. Dumaw has failed to establish that Local 690 fired him because he supported Taylor, or because he filed his own whistleblower claim.

RECOMMENDED ORDER

Because Dennis Dumaw has failed to establish that Foster Wheeler played any part in his lay-off or discharge, or that Local 690 laid him off or discharged him because he engaged in protected activity, I recommend that his complaint filed with the Occupational Safety and Health Administration on August 30, 2000, be dismissed.

A
ALICE M. CRAFT
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 CFR §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 CFR §§ 24.7(d) and 24.8.